

## Part 4

# Securing a Social Minimum: The Role of Courts and Supervisory Bodies



## *Giving Legal Substance to the Social Minimum*

COLM O’CINNEIDE

### I. AN INTRODUCTORY NOTE – SETTING THE SCENE

THE CURRENT POLITICAL crisis which has engulfed the neoliberal political/economic orthodoxy of the last few decades has reopened serious debate about the social ordering of contemporary societies. Long-term socio-economic trends are also influencing this debate, especially factors related to the environment, globalisation and technological development. It is increasingly clear that the current socio-economic status quo in western liberal democracies is unsustainable – an insight which is generating some rich discussions across a variety of fields of intellectual activity.<sup>1</sup>

Law is no exception. Fifteen years ago, a tiny minority of legal scholars were interested in the relationship between political economy, social rights/equality claims, and the interlocking structures of public and private law regulation. That has changed – dramatically. Now, there exists intense debate about in particular the status and function of socio-economic rights (hereafter ‘SER’), their relationship with other national and international legal standards, and whether and how legal protection of such rights can secure better social protection in liberal democracies.<sup>2</sup>

Despite all this intellectual activity, ~~a sceptic might inquire as to whether it is desirable for this debate about legal rights to figure prominently in debates about the subject of this book – ie the ‘social minimum’~~ (which, in common with other chapters in this book, is understood to refer to the floor of socio-economic protection that states should put into place to show adequate respect for the human dignity and equal status of their inhabitants). It could be argued that it is better for debates about social protection and the role of the state in

<sup>1</sup>For a flavour of the rich and wide-ranging nature of these debates, see ch 5 (Adler) and ch 9 (Piachaud) in this volume.

<sup>2</sup>See eg ch 2 (Bilchitz), ch 16 (Boyle) and ch 13 (Warwick) in this volume.

securing the socio-economic well-being of its inhabitants not to be contaminated with ‘rights talk’, given what Moyn has described as its ‘individualistic and anti-statist’ ethos.<sup>3</sup> The post-war European welfare states, which provided a floor of social protection arguably unmatched elsewhere in human history, were constructed with scant reference to the conceptual language of rights.<sup>4</sup> Is this language of rights – especially as articulated through an inevitably constrained and constricting legal vocabulary – really of any particular use when it comes to discussing ways of reimagining the concept of a social minimum for our marketised, fragmented, increasingly technology-disrupted society?<sup>5</sup>

It certainly would be foolish to place too much faith in the potential of legal rights discourse in particular to be a major weapon in the fight to secure a decent social minimum for all. The conceptual structure of legal human rights, which is predominantly focused on the dignity and status of individuals as understood through the lens of social contract theory, lacks the capacity to give full expression to the egalitarian, solidaristic and redistributionist values that in the final analysis provide the only stable foundation for a comprehensive system of social protection.<sup>6</sup> Furthermore, law tends to be an inefficient tool of social change – which, as Adler and Piachaud emphasise in their contributions to this volume, is sorely needed. Legal actors are predominantly focused on maintaining stability and consistency within the functioning of the legal system rather than acting as agents of social transformation, while the rigidity and comparatively closed structure of the legal process makes it a poor vehicle for engaging with issues of social protection and economic redistribution.<sup>7</sup>

However, it would also be foolish to ignore the potency of rights discourse.<sup>8</sup> At both the political and legal levels, it can lend significant normative weight to moral claims that might otherwise be relegated to the status of ‘politics as usual’. If effective ways could be found of bringing this normative weight to bear in the context of debates about the ‘social minimum’, this could bring

<sup>3</sup> S Moyn, *Not Enough? Human Rights in an Unequal World* (Cambridge, MA, Harvard University Press, 2018).

<sup>4</sup> See ch 12 by Kotkas in this volume; also, by the same author, ‘The Short and Insignificant History of Social Rights Discourse in the Nordic Welfare States’ in T Kotkas and K Veitch, *Social Rights in the Welfare State: Origins and Transformations* (London, Routledge, 2017) 15–34. However, note also by way of contrast, the interesting discussion in MR Madsen, ‘Between the Law-State and the Welfare State: The Structural Limits of Legal-Political Liberalism in the Danish Welfare State’, forthcoming in M Feeley and M Langford, *The Limits of the Legal Complex: Nordic Lawyers and Political Liberalism* (2019).

<sup>5</sup> In the workshops held to discuss first drafts of the chapters in this volume, in July 2017 in Oñati and September 2018 in Gothenburg, the usefulness or otherwise of legal rights discourse in structuring and giving effect to the social minimum was a source of considerable debate – which greatly assisted the writing of this chapter. Interestingly, at both events, legal experts were often more sceptical of the usefulness of law than their counterparts in the wider social sciences: the former tended to emphasise the limits of legal mechanisms, while the latter were more positive about their potential.

<sup>6</sup> F Atria, ‘Social Rights, Social Contract, Socialism’ (2015) 24 *Social & Legal Studies* 598.

<sup>7</sup> See further ch 12 (Kotkas) in this volume.

<sup>8</sup> See further ch 16 (Boyle) and ch 9 (Piachaud) in this volume.

new justificatory pressure to bear on government (in)action in the field of social protection that might otherwise be largely insulated against political or legal challenges. It could also push back against the dominant influence of neoliberal orthodoxy which has shaped debates about the social minimum for decades now, by using the potent language of rights to frame the importance of access to education, healthcare and other forms of basic social provision to human flourishing.<sup>9</sup> This could have particular impact when it comes to interpreting the legislative framework that regulates access to social entitlements, which as Frans Pennings notes in chapter ten of this volume, has become increasingly restrictive in many European states.

Finding effective ways of protecting SER through law has particular potential in this regard. Political claims about the importance of SER, such as the right to social security or to healthcare, can be easy to ignore – but legal claims are less so, if they have a solid basis in national and/or international law. Legal action compels some sort of state response: it can thus be effective in opening up aspects of state functioning to challenge, which might otherwise be fairly impervious to other forms of external pressure. In particular, as Gauri and Brinks have argued, giving legal protection to SER has the potential in particular to open up avenues for members of marginalised social groups to challenge failures in social provision – and thereby to introduce new forms of accountability for how the social minimum is designed and implemented in practice.<sup>10</sup>

However, achieving this potential is not an easy or straightforward matter. There are complex design issues to be addressed before the legal protection of SER can play a meaningful role in supplementing other policy levers in securing adequate access to the social minimum. If such legal protection is purely tokenistic in character, or lacks credibility and/or effectiveness, then it may have counter-productive effects.<sup>11</sup> This chapter focuses on one specific, if key, design challenge – namely how to ensure that legal tests designed to identify breaches of SER are sufficiently clear, determinate and demanding to play a useful role in protecting access to the social minimum.

## II. THE CHALLENGES OF GIVING LEGAL EFFECT TO SER

As concepts, SERs serve several different functions. In particular, they give expression (via the potent language of rights discourse) to the normative obligations of states to take adequate steps to secure the socio-economic wellbeing of their inhabitants. They are also supposed to serve as legal and political benchmarks to assess whether states are living up to their commitments. In other

<sup>9</sup> See, in general, A Sen, *The Idea of Justice* (Cambridge, MA, Harvard University Press, 2009).

<sup>10</sup> V Gauri and DM Brinks, 'Human Rights as Demands for Communicative Action' (2012) 20 *Journal of Political Philosophy* 407.

<sup>11</sup> See ch 2 (Bilchitz) in this volume.

words, they play both a symbolic and a legal/regulatory role: they set out the objectives of state action in the socio-economic field, and are also supposed to serve as measuring tools in monitoring and regulating state progress towards achieving those particular objectives.<sup>12</sup>

Such social rights commitments receive plenty of lip service in official rhetoric. The majority of national constitutions contain provisions that rhetorically affirm the fundamental character of one or more SER.<sup>13</sup> Furthermore, almost all liberal democratic states have agreed to be bound by international human rights treaties containing SER provisions, with the International Covenant on Social, Economic and Cultural Rights (ICESCR), the European Social Charter (ESC) and the ILO ‘core standards’ framework being the most prominent examples.

However, in actuality, SER are widely regarded as having little if any real substance – either at the symbolic/political level, or as a matter of law. As Alston has recently argued, rhetoric endorsement of such rights should not be confused with real commitment.<sup>14</sup> National governments often treat their SER obligations under ICESCR and other human rights treaties as amounting to little more than vague expressions of good faith. Even in states whose constitutions affirm the existence of such rights, or who directly incorporate the provisions of international treaty instruments such as ICESCR into domestic law, such rights are often viewed as amounting to little more than abstract ‘maxims of political morality’.<sup>15</sup> In other words, states are willing to acknowledge the importance of SER as abstract objectives to be realised in the long term – but are extremely reluctant to subject themselves to SER compliance requirements.

This reflects the marginal and contested status of SER within liberal democratic constitutional theory, as well as human rights discourse more generally. Plenty of scepticism exists as to whether SER really qualify as substantive ‘rights’, in the sense of being imperative claims that impose binding obligations upon state institutions. In particular, SER are regarded as being highly indeterminate. They are widely assumed to lack specific content, and therefore are incapable of giving rise to legally cognisable ‘rights’ which impose corresponding Hohfeldian duties upon the state and/or other private actors.<sup>16</sup>

This perception that SER are at best ‘imperfect obligations’, and at worst pure exercises in well-meaning rhetoric, casts a shadow over all promotional or enforcement activity intended to secure better respect for such rights. It fuels

<sup>12</sup>Gauri and Brinks, ‘Human Rights as Demands’ (2012).

<sup>13</sup>R Hirschl, ‘From Comparative Constitutional Law to Comparative Constitutional Studies’ (2013) 11 *International Journal of Constitutional Law* 1, 8–9.

<sup>14</sup>P Alston, ‘The Populist Challenge to Human Rights’ (2017) 9 *Journal of Human Rights Practice* 1.

<sup>15</sup>This phrase is associated with Dicey’s criticisms of the deployment of abstract guiding norms within the tradition of French constitutionalism: see AV Dicey, *Introduction to the Study of the Law of the Constitution* (London, Macmillan, 1st edn 1885; 10th edn, 1959) App I.

<sup>16</sup>See eg M Cranston, ‘Rights: Real and Supposed’ in DD Raphael (ed), *Political Theory and the Rights of Man* (Bloomington, Indiana University Press, 1967) 43–51; O O’Neill, ‘The Dark Side of Human Rights’ (2005) 81 *International Affairs* 427.

the widely held belief that they amount to little more than social justice claims dressed up in a thin veneer of ‘rights talk’ and lacking much in the way of real normative force.

This ‘indeterminacy’ critique of SER also feeds into and reinforces the widely held assumption that any self-respecting democracy must leave important issues of social and economic policy to be resolved by democratically accountable politicians, especially when such issues generate complex and ‘polycentric’ considerations relating to resource allocation. The apparently insubstantial nature of SER is used as a justification for classifying them as matters of ‘policy’ rather than ‘principle’, to use Dworkin’s classification:<sup>17</sup> they are usually viewed as matters best left to be regulated by the free flow of political debate and bureaucratic control, rather than benefiting from the special legal and political status according to ‘real’ human rights.<sup>18</sup> This generates resistance to any attempts to take SER more seriously: it even encourages national and international courts and other key actors to develop ‘containment doctrines’ designed to prevent existing forms of rights protection spilling over into the socio-economic realm.<sup>19</sup>

The apparent indeterminacy of SER can also hinder their impact, even in contexts where political and/or legal actors are favourably disposed towards recognising them as ‘real’ human rights. National and international human rights bodies frequently talk about the importance of SER, but rarely focus in on any specific alleged infringements of such rights – often because considerable uncertainty exists as to what qualifies as a breach of any given SER.<sup>20</sup> At national level, it is commonplace for governments to be accused of breaching social rights: however, such accusations often have little impact, given the lack of consensus that exists about the substantive content of such rights. Even well-meaning public servants struggle to get to grips with what they can see as the highly open-ended and uncertain norms set out in international SER instruments.<sup>21</sup>

Enthusiasts for SER<sup>22</sup> tend to get impatient with this indeterminacy critique. They often argue that SER are intrinsically no more indeterminate than civil and political rights (CPR) such as freedom of speech, fair trial or equality and non-discrimination: both SER and their civil and political counterparts protect the core of human dignity, and the only substantive distinction between the two

<sup>17</sup> R Dworkin, *Taking Rights Seriously* (Cambridge, MA, Harvard University Press, 1978).

<sup>18</sup> G Liu, ‘Rethinking Constitutional Welfare Rights’ (2008) 61 *Stanford Law Review* 203.

<sup>19</sup> C O’Cinneide, ‘The Problematic of Social Rights – Uniformity and Diversity in the Development of Social Rights Review’ in L Lazarus, C McCrudden and N Bowles (eds), *Reasoning Rights: Comparative Judicial Engagement* (Oxford, Oxford University Press, 2014) 297–315.

<sup>20</sup> See ch 13 (Warwick) in this volume.

<sup>21</sup> A UK civil servant once confessed to the author of this chapter that she had tried to apply the relevant standards from ICESCR and other SER instruments as set out in the Scottish National Action Plan for Human Rights (prepared by the Scottish Human Rights Commission – accessible online at [www.snaprights.info](http://www.snaprights.info)) to public housing allocation decisions, and had found them to be lacking sufficient substance to be of much practical use to her.

<sup>22</sup> The term ‘enthusiasts for SER’ is not meant in a pejorative sense: I am one myself.

categories of rights is that an overlapping political/legal consensus has not yet emerged as to the substantive content of SERs as opposed to free speech and the other ‘better established’ CPR. They also tend to highlight the uncertain penumbra of well-established civil and political rights such as fair trial, and by extension suggest that the process of defining the scope and substance of SER poses no inherent difficulties that are not also present in case of civil and political rights.<sup>23</sup>

Moving away from the conceptual level, SER enthusiasts also argue that interpretative tools exist that are capable of giving clear definition to these rights. They highlight in particular the legal techniques used by expert human rights bodies such as the Committee on Economic, Social and Cultural Rights (CESCR) to flesh out the abstract guarantees set out in instruments such as ICESCR, and the way in which judicial organs such as the South African Constitutional Court have similarly interpreted and applied national constitutional SER guarantees. According to the enthusiasts, the interpretative methods used by such bodies provide clear evidence that SER can be read as imposing specific and tangible duties upon particular state actors – and therefore cannot be dismissed as empty maxims. They also argue that these methods show that SER can be interpreted and applied in a way that does not unduly constrain democratic choice, while still ensuring effective protection for the social minimum that should be available to all within a given society.<sup>24</sup>

This debate has turned on the spotlight on how the legal protection of SER has developed in practice. Existing legal mechanisms for interpreting and applying SERs have been analysed in detail, with a view to assessing the effectiveness and feasibility of adjudicating SER. There is now an extensive literature on this topic, which is impossible to summarise in detail. However, it is possible to identify certain trends and practices, which give some indication of how the legal protection of SER might be designed so as to enhance its capacity to make a positive contribution to the maintenance of a decent social minimum in contemporary societies.

### III. ADJUDICATING SER – TRENDS AND PRACTICES

The first attempts made to inject a substantive SER dimension into the functioning of national constitutional systems tried to make use of the role of constitutions as ‘mission statements’, ie affirmations of the values and principles that are supposed to guide state conduct.<sup>25</sup> Social rights provisions were

<sup>23</sup> See eg N Jheelan, ‘The Enforceability of Socio-Economic Rights’ (2007) 2 *European Human Rights Law Review* 146.

<sup>24</sup> For this debate, see in general C Gearty and V Mantouvalou, *Debating Social Rights* (Oxford, Hart, 2010).

<sup>25</sup> J King, ‘Constitutions as Mission Statements’ in D J Galligan and M Versteeg (eds), *Social and Political Foundations of Constitutions* (Cambridge, Cambridge University Press, 2013) 73–103.



inserted into the text of the Mexican Constitution of 1917, the Constitution of the Weimar Republic in 1919, and subsequently into many other constitutional texts drawn up in the aftermath of the two world wars and the decolonisation process. These constitutional provisions were intended to assert the fundamental importance of SER, and to orientate the exercise of state power by the executive, judicial and, in particular, the legislative branches of government towards socially positive goals.<sup>26</sup>

These ambitions attracted controversy from the outset. Many legal scholars viewed the inclusion of social rights provisions within constitutional texts as an exercise in empty rhetoric, while conservative critics attacked their inclusion on the basis that they constituted an attempt to close down political debate about the orientation of public policy. However, the inclusion of ‘orientating’ or ‘directive’ SER provisions in national constitutional texts proved to be a popular option. It proved to have particular appeal in continental Europe in the wake of WWII, as it provided constitutional backbone for the establishment of the post-war national welfare states.<sup>27</sup> It also appealed to the drafters of many Latin American and African constitutions, both in the post-war era of decolonisation and the era of post-Cold War democratisation that began in the late 1980s.<sup>28</sup> As a result, many nation’s constitutions now expressly affirm that they are ‘social states’<sup>29</sup> and/or contain lists of fundamental social rights or directive principles setting out social goals to which state policy should strive to give effect.<sup>30</sup>

These provisions are generally viewed as establishing objective constitutional norms that are supposed to provide a normative steer for the exercise of public power by the executive, legislative and judicial branches. In some states, these objective norms have acquired a degree of legal substance – in the sense that they are treated as part of the background framework of constitutional principles that courts must take into account in reviewing the actions of public authorities and interpreting and applying other legal norms.<sup>31</sup> In other states, they take effect solely within the symbolic/political plane.

<sup>26</sup> Hirschl, ‘From Comparative Constitutional Law’ (2013).

<sup>27</sup> See eg Art 23 of the Constitution of Belgium, Arts 19, 20 and 22 of the Constitution of the Netherlands; Arts 21 and 22 of the Constitution of Greece; Arts 56, 59, 63–72, 108–109, 167, 216 of the Constitution of Portugal.

<sup>28</sup> See eg Title V of the Constitution of Costa Rica 1949; Ch VI of the Constitution of the Republic of Ghana 1992; Ch II of the Constitution of the Federal Republic of Nigeria 1999.

<sup>29</sup> See eg Art 1(1) of the Constitution of Spain; Art 2 of the Constitution of Portugal; Art 2 of the Constitution of Slovenia; Art 20 of the German Basic Law.

<sup>30</sup> Directive Principles India/Ireland; ss 26 and 27 of the South African Constitution 1996.

<sup>31</sup> Thus, in Germany, primary and secondary legislation may be interpreted by reference to the requirements of the ‘social state’ (*Sozialstaat*) principle, which is one of the primary elements of the constitutional order which has a textual anchor in Art 20 of the German Basic Law providing that the ‘Federal Republic of Germany is a democratic and social federal state’ [author’s italics]: see HM Heinig, ‘The Political and the Basic Law’s Sozialstaat Principle – Perspectives from Constitutional Law and Theory’ (2011) 12 *German Law Journal* 1879–886. See also G Katrougalos, ‘The Implementation of Social Rights in Europe’ (1996) 292 *Columbia Journal of European Law* 277–312.

However, this attempt to embed SER ‘mission statements’ in national constitutions has had limited impact. The normative steer provided by constitutional social rights provisions or directive principles generally takes effect only within the interstices of the liberal constitutional framework of values. This means they do not usually disturb existing assumptions about separation of powers, and it is generally assumed that the legislative and executive should play the dominant role in defining the scope and content of SER. As a result, it is often unclear what will constitute a failure by the political branches of government to give them effect.<sup>32</sup> Furthermore, such SER provisions are often couched in such general terms as to lack any clear normative substance. This dilutes their impact at both the legal and political levels, and ensures they remain overshadowed by the indeterminacy issue. By and large, they resemble rhetorical gestures rather than concrete commitments.<sup>33</sup>

Similar issues arise with the SER instruments developed within the framework of the UN, ILO, Council of Europe and other international organisations. These instruments – ICESCR, the European Social Charter (ESC), the various ILO Conventions and Recommendations and so on – set out binding international SER standards, with a view to establishing a common floor of transnational protection for social rights. Their provisions have played an important role in shaping debates about SER, and have exerted a certain degree of influence over the development of national law and policy – in particular in the area of labour market regulation. However, once again, indeterminacy has limited their impact, along with the lack of strong enforcement and monitoring mechanisms: states have considerable wriggle room under these instruments, and for the most part face little justificatory pressure to enhance the level of social protection they provide.<sup>34</sup>

These limitations of SER provisions at both national and international level has prompted many scholars and activists to argue that courts and other monitoring/enforcement bodies should take a more active role in interpreting and securing compliance with these provisions. Supporters of this approach argue that, just as judicial interpretation has helped to give greater shape and definition to civil and political rights, so too could it help to combat the indeterminacy problems with SER – thereby in turn generating more justificatory pressure on governments and legislatures to comply with these standards.<sup>35</sup>

These arguments have struck a chord in many different legal systems. Giving courts and other enforcement bodies greater authority to interpret and apply

<sup>32</sup> C O’Cinneide, ‘Austerity and the Faded Dream of a Social Europe’ in A Nolan (ed) *Economic and Social Rights after the Global Financial Crisis* (Cambridge, Cambridge University Press, 2014) 169–201.

<sup>33</sup> *ibid.*

<sup>34</sup> *ibid.*

<sup>35</sup> M Langford, ‘The Justiciability of Social Rights: From Practice to Theory’ in M Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge, Cambridge University Press, 2012) 3–45.

SER standards is increasingly viewed as a way of putting flesh on the bones of existing constitutional and international human rights treaty commitments, and thereby of opening up new avenues for disadvantaged individuals and groups to challenge state inertia in giving effect to these standards.<sup>36</sup> It is now possible to speak of the existence of a ‘social rights problematic’, whereby the lack of a SER adjudicatory mechanism is increasingly viewed as constituting a defect or lacuna within a national constitutional order.<sup>37</sup>

Indeed, the shift in the discourse that surrounds SER has been so marked that Tushnet in 2013 claimed that ‘debate has ended over whether constitutions should include such rights and whether, if included, those rights should be judicially enforceable ... [n]ot “whether,” but “how” is the question now on the table among serious scholars and judges’.<sup>38</sup> This is a (deliberately?) exaggerated argument: deep scepticism still persists in many jurisdictions about the feasibility and desirability of giving/allowing courts to play an active role in interpreting and secure respect for SER. But it has resulted in the emergence of SER rights review in multiple different jurisdictions around the world, ranging from India, Brazil and Colombia to certain US state jurisdictions and even within the framework of EU law via the provisions of the EU Charter of Fundamental Rights and Freedoms. It has also lead to steps being taken at international level to reinforce the status and interpretative authority of SER monitoring bodies, such as the CESCR and the European Committee on Social Rights (ECSR) – as exemplified by the addition of an Optional Protocol providing for an individual complaints mechanism to ICESCR,<sup>39</sup> and a ‘collective complaints’ mechanism to the ESC.<sup>40</sup>

However, the jury remains out as to the legitimacy and effectiveness of such forms of SER review. To establish themselves as meaningful forms of rights adjudication, they need to meet certain challenges. For example, they must be able to cope with the complexity of state administrative structures, and function in a way that minimises any unwanted and unplanned negative consequences for social protection in the states where they take effect.<sup>41</sup> SER review must also be conducted in a manner that takes the fact of political

<sup>36</sup> See ch 16 (Boyle) in this volume.

<sup>37</sup> O’Cinneide, ‘Austerity and the Faded Dream’ (2014).

<sup>38</sup> M Tushnet, ‘A Response to David Landau’, *Opinio Juris Blog*, 23 January 2012, available at [http://opiniojuris.org/2012/01/23/hilj\\_tushnet-responds-to-landau](http://opiniojuris.org/2012/01/23/hilj_tushnet-responds-to-landau).

<sup>39</sup> For analysis, see M Langford, B Porter, R Brown and J Rossi (eds), *The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: A Commentary* (Pretoria, Pretoria University Press, 2016).

<sup>40</sup> R Churchill and U Khaliq, ‘The Collective Complaints System of the European Social Charter: An Effective Mechanism for Ensuring Compliance with Economic and Social Rights?’ (2004) 15 *European Journal of International Law* 417.

<sup>41</sup> R Stacey, ‘Dynamic Regulatory Constitutionalism: Taking Legislation Seriously in the Judicial Enforcement of Economic and Social Rights’ (2017) 31 *Notre Dame Journal of Law, Ethics and Public Policy* 85–128. See also J King, *Judging Social Rights* (Cambridge, Cambridge University Press, 2012).

disagreement seriously: it must leave ample room for electoral contestation and popular mobilisation to shape the general direction of socio-economic policy, while also opening up new avenues for marginalised segments of society to participate in this process of collective self-determination.<sup>42</sup> And, in particular, it must engage with the problem of indeterminacy: the practice of SER review must give real substance to the scope and content of these rights, while simultaneously respecting the need for all forms of constitutional rights adjudication to conform to rule of law values such as clarity, consistency and internal coherence.<sup>43</sup>

In other words, SER review by courts and similar institutions must avoid the Scylla of under-enforcement (which is linked to indeterminacy) on the one hand and the Charybdis of judicial overreach on the other – or, as Michelman put it, adjudicators engaged in SER review need to avoid the dangers of either illegitimately ‘usurping’ the functions of other branches of government or of ‘abdicating’ their responsibility to protect social rights.<sup>44</sup> Without careful navigation of this treacherous passage, the legal protection of SER is unlikely to contribute much to securing an adequate social minimum. Even if SER adjudication manages to walk this tightrope, other hurdles exist: governments may prove unresponsive to its conclusions, background socio-economic or political circumstances may make SER decisions unenforceable, or potential litigants may be unwilling or unable to access the legal process to trigger SER claims in the first place. But, unless legal protection of SER is capable (as a first step) of giving these rights some tangible content in a way that does not fall foul of the ‘usurpation’/‘abdication’ tension, it will have nothing to offer wider debates about securing the social minimum.

#### IV. EVADING THE ‘MINIMUM’ – WHY SER ENTHUSIASTS ARE OFTEN RELUCTANT TO ENGAGE WITH THE SUBSTANTIVE CORE OF SER

Negotiating this ‘usurpation’/‘abdication’ tension will inevitably be a difficult process. Many leading commentators have suggested that this tension can be managed through the use of ‘weak-form’, ‘experimental’, ‘catalytic’ and other ‘dialogical’ modes of judicial review, whereby courts enter into deliberative-dialogical relationships with other constitutional actors to address violations of SER.<sup>45</sup> Others have focused on the potential of court-supervised participative

<sup>42</sup> A Pillay, ‘Towards Effective Social and Economic Rights Adjudication: The Role of Meaningful Engagement’ (2012) *10 International Journal of Constitutional Law* 732.

<sup>43</sup> S Liebenberg, ‘Needs, Rights and Transformation: Adjudicating Social Rights in South Africa’ (2006) *17 Stellenbosch Law Review* 5.

<sup>44</sup> F Michelman, ‘Socioeconomic Rights in Constitutional Law: Explaining America Away’ (2008) *6 International Journal of Comparative Constitutional Law* 663.

<sup>45</sup> M Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton NJ, Princeton University Press, 2008); K Young, *Constituting*

processes, which can bring public authorities and socio-economically disadvantaged groups together in a process of ‘meaningful engagement’.<sup>46</sup>

All these dialogical/catalytical techniques may help courts and other bodies manage the process of SER adjudication, by providing them with useful ways of navigating a feasible path between judicial over-reach on one hand and under-protection of SERs on the other. But the extent to which the literature on SER review has focused on these managerial techniques is striking – and concerning. These modes of adjudication can help to alleviate some of the tensions associated with SER review, but ultimately by themselves provide little if any answer to the problem of indeterminacy. They fail to provide any meaningful guidance as to when courts and enforcement bodies are justified in finding particular forms of state (in)action to be a violation of the relevant provisions of national and/or international human rights law relating to SER. As such, they focus on process rather than substance.

In part, this reflects the existence of considerable scepticism in some of the leading academic commentary on SER rights review as to the desirability of trying to define the content of such rights. Katie Young and others have argued that attempts to identify the basic needs that should be guaranteed by SER are conceptually flawed.<sup>47</sup> In their view, such needs vary from individual to individual and/or can only be defined by reference to a ‘thick’ contextual account of relevant circumstances that lie beyond the expertise or capacity of courts and other enforcement bodies to formulate. As such, they argue that any form of SER review that is focused on identifying the content of such rights will inevitably either over-reach (as arguably took place in the early years of the Brazilian jurisprudence)<sup>48</sup> or degenerate into a highly attenuated and minimalistic form of legal protection which will cover little more than bare survival needs. Instead, they argue that the focus of SER review should be on benchmarking whether state action is enhancing or undermining existing methods of protecting such rights. In other words, courts and other enforcement bodies in monitoring compliance with SER standards should direct their energies towards

*Social Rights* (Oxford, Oxford University Press, 2012); R Dixon, ‘Creating Dialogue about Socio-Economic Rights: Strong-Form versus Weak-Form Judicial Review Revisited’ (2007) 5 *International Journal of Comparative Constitutional Law* 391; O Gerstenberg, ‘The Justiciability of Socio-economic rights, European Solidarity, and the Role of the Court of Justice of the EU’ (2014) 33 *Yearbook of European Law* 245.

<sup>46</sup> Pillay, ‘Meaningful Engagement’ (2012); S Liebenberg and K Young, ‘Adjudicating Social and Economic Rights: Can Democratic Experimentalism Help?’ in H Garcia, K Klare and L Williams (eds) *Social and Economic Rights in Theory and Practice, Critical Inquiries* (London, Routledge, 2015) 237–58.

<sup>47</sup> Young, *Constituting Social Rights* (2012); also X Contiades and A Fotiadou, ‘Social Rights in the Age of Proportionality: Global Economic Crisis and Constitutional Litigation’ (2012) 10 *International Journal of Constitutional Law* 660.

<sup>48</sup> O Ferraz, ‘Brazil: Health Inequalities, Rights and Courts’ in AE Yamin and S Gloppen (eds) *Litigating Health Rights: Can Courts Bring More Justice to Health?* (Cambridge, MA, Harvard University Press, 2011) 76–102.

assessing the reasonableness or proportionality of government measures which affect existing levels of social rights protection, with the dialogical/catalytical adjudicatory techniques discussed above serving as a way of opening up this process to previously marginalised perspectives.<sup>49</sup> The emphasis should be on scrutinising the justifiability of state action that has a negative impact on the social minimum, rather than attempting to define the scope and substance of SER as such.

This approach mirrors key elements of the techniques used by CESCR to monitor state compliance with their obligations under ICESCR. In interpreting the obligations imposed on state parties by Article 2 ICESCR to ‘take steps ... to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant’, CESCR places considerable reliance upon the concepts of ‘reasonable progression’ and (to a lesser extent) ‘non-regression’ in assessing state compliance with their SER obligations.<sup>50</sup> In other words, the Committee primarily monitors state performance with reference to the extent to which they are progressing towards, or deviating from, the ideal state of SER protection that the Committee outlines in its General Comments and other interpretative statements. In contrast, the Committee places less emphasis on delineating the minimum core of ICESCR rights and assessing whether states have given effect to this core: it is interpreted as only including a residual quantity of bare needs, and both CESCR and assorted academic commentators have expressed concern that compliance with this minimum core should not be taken to constitute conformity with a state’s overall obligations under ICESCR.<sup>51</sup>

An analogous approach has been adopted in South Africa, with the Constitutional Court there reviewing the reasonableness of state (in)action which affects progress towards giving effect to SER: questions of the core content of such rights are relevant to such reasonableness review, but are not central to its functioning.<sup>52</sup> A similar approach appears to underlie the application of proportionality analysis in the context of judicial review of state measures affecting social rights entitlements in certain European states.<sup>53</sup>

Thus, as advocated by Young and others, the focus in many of the most prominent systems of SER review is on reviewing the reasonableness or proportionality of state measures, with reference to the manner in which they alter existing forms of social provision. The question as to what forms of social

<sup>49</sup> Liebenberg and Young, ‘Adjudicating Social and Economic Rights’ (2015).

<sup>50</sup> UN CESCR, General Comment No 3: The nature of States parties obligations (Art 2, para 1 of the Covenant), UN Doc. E/1991/23 (1990).

<sup>51</sup> K Young, ‘The Minimum Core of Economic and Social Rights: A Concept in Search of Content’ (2008) 33 *Yale Journal of International Law* 113.

<sup>52</sup> See in general S Liebenberg, *Socio-Economic Rights: Adjudication under a Transformative Constitution* (Claremont, Juta, 2010).

<sup>53</sup> Contiades and Fotiadou, ‘Age of Proportionality’ (2012).



support individuals are entitled to ‘as of right’ – ie what ‘social minimum’ is the state required to provide – is relegated to the margins.<sup>54</sup>

#### V. ENGAGING THE SOCIAL MINIMUM – GIVING SUBSTANCE TO SER

This attractiveness of this benchmarking approach lies in how it avoids the need to define the basic social obligations of the state towards the inhabitants of its territory: it leaves such issues to the political process, and confines itself to assessing the reasonableness or proportionality of measures that adjust the established floor of social protection. It patrols respect for the social minimum, rather than seeking to define it – which could be viewed as showing proper respect to the politicians and experts that define its content, and as adhering to traditional legal methodology by reviewing the procedural logic of decision-making processes rather than their substance as such.<sup>55</sup>

However, there are problems with this approach. Concepts such as ‘reasonableness’, ‘non-regression’, ‘reasonable progression’ and ‘proportionality’ are inherently vague and open-ended. As Bilchitz has argued in respect of the use of proportionality analysis in this context, such an adjudicative device ‘cannot conceptually provide content to rights and, rather, requires ... supplementation by a doctrine of content’.<sup>56</sup> Without such a doctrine specifying the scope and content of social rights, or at least the outline of such a doctrine, there is a risk that wide-ranging reasonableness review may generate seriously inconsistent or incoherent case law.<sup>57</sup> In other words, patrolling respect for the social minimum may appear to adhere to orthodox judicial review methodology – but it will be difficult to decide on a consistent and rigorous basis when public authorities have failed to show respect for the minimum, if there is no clear idea of what respecting the minimum entails as a matter of substance.

The concern of Young and others that a focus on defining the scope and substance of SER will generate a ‘lowest common denominator’ jurisprudence is legitimate: mapping out what states must provide as a minimum does risk that floor becoming a ceiling. However, the alternative – side-stepping the issue of content, and trying to evade the indeterminacy problem of SER through the

<sup>54</sup> See further ch 12 (Kotkas) in this volume.

<sup>55</sup> See further ch 14 (Leijten) in this volume.

<sup>56</sup> D Bilchitz, ‘Socio-economic Rights, Economic Crisis, and Legal Doctrine’ (2014) 12 *International Journal of Constitutional Law* 710–39, and also his chapter in this volume. Contiades and Fotiadou in replying to Bilchitz’s argument have argued that the use of proportionality analysis by the Italian and Portuguese courts amongst others during the austerity crisis has shown that no such ‘doctrine of content’ is required to generate a coherent and substantive case law: X Contiades and A Fotiadou, ‘A Reply to David Bilchitz’ (2014) 12 *International Journal of Constitutional Law* 740. I do not share their unqualified enthusiasm for this case law.

<sup>57</sup> For general discussion of this point, see J King, *Judging Social Rights* (Oxford, Oxford University Press, 2012).

use of benchmarking strategies – brings its own problems: any jurisprudence established on this basis will be built on unstable foundations, and may struggle to attain coherence and genuine substance.

In contrast, for all the dangers of a substantive approach degenerating into a ‘bare minimum’ analysis, it has the advantage of focusing attention on the positive entitlements of individuals. It also arguably can provide courts and other enforcement bodies with a clearer normative steer as to how they should exercise their review functions, and give more definition to open-ended tests such as reasonableness or proportionality.<sup>58</sup> It also would parallel the type of reasoning deployed in civil and political rights adjudication, which is structured around assessing the legitimacy of government interference with a defined set of *prima facie* entitlements – perhaps acquiring more legitimacy as a consequence.

Conceptual tools also exist which can be brought to bear to delineate the core content of SER in a way that does not reduce it to the lowest common denominator. Existing established human rights standards, relating to both SER and their civil and political counterparts, can be extended incrementally through standard legal/analogical reasoning.<sup>59</sup> The content of this social minimum can also be derived in part from the various statutory and administrative guidelines that specify the baseline forms of social support to be provided in general to citizens of the state:<sup>60</sup> such guidelines can provide courts and other enforcement bodies with a point of reference in determining the substance of a state’s SER obligations more generally.<sup>61</sup> Social science research on the necessary scope and substance of a social minimum, such as that outlined by Eichenhofer and Goedemé et al in their contributions to this volume, can also be a useful reservoir of expertise – subject to the limited capacity of judges and other legal actors to integrate expert perspectives from other disciplines into the specialist framework of legal discourse. Furthermore, as the philosophical debate about SER has mushroomed over the last decade or so, the crude ‘basic needs’ approach to determining the core content of SER has increasingly given way to more robust forms of analysis, which focus on defining SER in terms of the minimum respectful treatment that should be enjoyed on an equal basis by all inhabitants of a shared social space.<sup>62</sup>

Such a greater focus on defining the substance of SER could be integrated within existing modes of rights review in this context: what is being argued for

<sup>58</sup> Bilchitz, ‘Socio-economic Rights’ (2014).

<sup>59</sup> King, *Judging* (2012).

<sup>60</sup> See ch 10 (Pennings) in this volume.

<sup>61</sup> A careful analogy could be drawn here to developments in India: see M Khosla, ‘Making Social Rights Conditional: Lessons from India’ (2010) 8 *International Journal of Constitutional Law* 739.

<sup>62</sup> S Meckled-Garcia, ‘Giving up the Goods: Rethinking the Human Right to Subsistence, Institutional Justice, and Imperfect Duties’ (2013) 30 *Journal of Applied Philosophy* 73–87. Morales has suggested that the substance of the social minimum should be defined by reference to what is necessary to enable citizens to participate effectively in the shaping of their society: see L Morales, ‘The Discontent of Social and Economic Rights’ (2017) *Res Publica* 257.



here is not an abandonment of catalytic approaches and their like, but their enhancement. Indeed, trace elements of such a substantive approach can be detected in the jurisprudence of most SER adjudicatory mechanisms. This is particularly pronounced in the India and Colombian systems – but the case can be made that even SER review in states like South Africa that are wedded to a reasonableness approach tends to be most effective in situations where: (i) the core content of the right in question can be readily identified, or (ii) where an analogy can be drawn with established norms relating to the enjoyment of core civil and political rights such as equality, privacy or even property.<sup>63</sup>

Templates also exist at both national and international level that serve as potential models as to how a more substantive engagement with the content of SER can be woven into the jurisprudence of courts and other enforcement bodies interpreting such rights – and which are fully compatible with dialogical/catalytical adjudicatory approaches.<sup>64</sup>

For example, the 2010 German Federal Constitutional Court (FCC) judgment in the *Hartz IV* case confirmed that the principle of human dignity set out in Article 1 of the Basic Law requires that persons in need be provided with sufficient material support to enable them to maintain a dignified existence and to participate in the social, cultural and political life of their society, and reviewed the manner in which benefit levels had been fixed by the German federal legislature by reference to this core requirement. Similarly, the FCC ruled in the case of *Asylum Seekers Benefits* that the amount of cash benefit paid to asylum-seekers waiting processing of their claims was incompatible with the substantive socio-economic requirements of the human dignity principle, and required the legislature to reconsider the amount of benefits available to this vulnerable group. Both judgments gave a certain amount of discretion to the legislature to set appropriate levels of social support, but nevertheless set out certain parameters within which this discretion had to operate – which were based upon the Court's interpretation of the substantive socio-economic content of the human dignity principle.<sup>65</sup>

Similarly, the jurisprudence of the European Committee on Social Rights in interpreting the ESC is built around a 'substantive content' model. The Committee makes use of both conceptual analysis and also established practice across Europe, together with authoritative points of reference such as Eurostat poverty levels, to help identify the extent of social protection that states are obliged

<sup>63</sup> See eg the judgment of the *South African Constitutional Court in City of Johannesburg v Blue Moonlight* [2011] ZACC 33 (CC).

<sup>64</sup> The jurisprudence of the European Court of Human Rights may also have some relevance here: see ch 15 (Kagiarios) and ch 14 (Leijten) in this volume.

<sup>65</sup> C Bittner, 'Human Dignity as a Matter of Legislative Consistency in an Ideal World: The Fundamental Right to Guarantee a Subsistence Minimum in the German Federal Constitutional Court's Judgment of 9 February 2010' (2011) 12 *German Law Journal* 1941; S Egidy, 'The Fundamental Right to the Guarantee of a Subsistence Minimum in the Hartz IV Case of the German Federal Constitutional Court' (2011) 12 *German Law Journal* 961.

to provide to individuals under provisions such as the Article 12 ESC right to social security or the Article 13 ESC right to social assistance. These thresholds are often attacked by states as being too demanding,<sup>66</sup> but they do establish concrete baseline standards. The Committee’s jurisprudence is not binding on state parties to the ESC (who include all the EU states, as well as the vast majority of the membership of the Council of Europe): however, their interpretation of the rights set out in the Social Charter is authoritative, meaning that national authorities should take this jurisprudence into account in framing national law and policy (even if this obligation is frequently ignored in practice).<sup>67</sup> Given the status of this jurisprudence, and the way it frames SER standards in substantive rather than purely procedural terms, the Social Charter has much to offer as a potential template for the future development of a fully fleshed-out SER jurisprudence.

## VI. CONCLUSION

The indeterminacy critique of SER needs to be taken seriously. If they are to have real bite, social minimum standards framed with reference to SER need to acquire a substantive, tangible dimension. For this to happen, activists and litigators need to focus on establishing how an alleged breach of a SER falls foul of constitutional standards, judges need to define the scope and content of such rights in such a manner that ensures that they provide genuine protection to individuals, and academics and other commentators need to reflect critically on what specific forms of state (in)action are incompatible with a socially engaged understanding of constitutionalism. Ways exist of identifying the content of a meaningful social minimum that individuals are entitled to as of right, and for courts to enforce compliance with this norm through strong or weak methods of review or some combination of the two – as demonstrated by the German Constitutional Court’s approach in *Hartz IV* and *Asylum Seeker Benefits*.

Having said that, an important point of qualification has to be entered here. As Van der Walt has argued, any SER jurisprudence will develop against the backdrop of conventional assumptions about separation of powers and the dominant political views of the day about the regulation of market economies and the appropriate level of social protection. As a result, any legal mode of SER rights protection will inevitably be orientated towards identifying the

<sup>66</sup> O’Cinneide (n 32). Complaint 48/2008, *European Roma Rights Centre (ERRC) v Bulgaria*, Decision on the Merits of 18 February 2009: instead of ruling that Bulgarian legislation which barred individuals unemployed for more than six months from receiving unemployment relief was a retrogressive step, the ECSR concluded that the legislation breached Bulgaria’s baseline obligation to provide a floor of social assistance to everyone in need imposed by Art 13§1 ESC.

<sup>67</sup> C O’Cinneide, ‘The European Social Charter and the UK: Why it Matters’ (2018) 29 *King’s Law Journal* 275.

‘worst acceptable governmental practice’ that will pass muster, as tends to be the case in other areas of constitutional rights review more generally – and this will impose inevitable constraints upon its transformative potential, irrespective of the particular model of social rights review one adopts.<sup>68</sup> In this respect, Samuel Moyn’s recent argument that human rights discourse in general is limited by its orientation towards a sufficiency approach is worth noting: despite the protests of some of his critics, this is probably true in the SER field as it is in other contexts.<sup>69</sup>

The legal language of rights and constitutional controls thus cannot give comprehensive expression to concepts of social justice, and should not be expected to do so. Political pressure and legislative reform will ultimately be the driver of any real change in this regard – as is normatively and practicably desirable.<sup>70</sup> However, a substantive approach to legal SER review as outlined here has the potential to add value to rights discourse and the wider project of securing adequate access to a decent social minimum, by sharpening the effectiveness of existing SER legal mechanisms at national or international level.

Emilios Christodoulidis argues that social rights constitutionalism, ie a commitment to making SER enforceable in law, has an ‘antinomic significance’ which injects ‘productive tension’ into contemporary constitutional discourse, not least because it disturbs ‘attempts to accommodate the continuity of civil, political, and social rights in the face of the contradictory articulation of social democracy and capitalism’.<sup>71</sup> It is suggested that the approach suggested here to the definition and adjudication of SER through law will give more legal substance to the idea of a social minimum, and thus has the potential to amply this ‘antinomic’ effect.<sup>72</sup>

<sup>68</sup> See J van der Walt, ‘Delegitimation by Constitution? Liberal Democratic Experimentalism and the Question of Socioeconomic Rights’ (2015) 3 *Critical Quarterly on Legislation and Law* 303.

<sup>69</sup> Moyn, *Not Enough* (2018). See also O Ferraz, ‘Poverty and Human Rights’ (2008) 28 *Oxford Journal of Legal Studies* 585.

<sup>70</sup> On this point, see Ferraz (ibid).

<sup>71</sup> E Christodoulidis, ‘Social Rights Constitutionalism: An Antagonistic Endorsement’ (2017) 44 *Journal of Law & Society* 123.

<sup>72</sup> As such, it has the potential to contribute to the wider transformative project outlined in ch 5 (Adler) and ch 9 (Piachaud) in this volume.

